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No. 94-749

In The

Supreme Court of the United States

October Term, 1994

JOHN J. HURLEY, Individually and the SOUTH BOSTON ALLIED VETERANS COUNCIL,

Petitioners,

v.

IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON, An Unincorporated Association, By and Through TIMOTHY DALEY, BARBRA KAY, and CATHLEEN FINN, Acting on Their Own Behalf and on Behalf of the Association,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Judicial Court Of Massachusetts

RESPONDENT'S REPLY CONCERNING MOOTNESS

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RESPONDENT'S REPLY CONCERNING MOOTNESS

Paying scant attention to the actual facts as they have developed, Petitioners resist Respondent's Suggestion of Mootness. Stripped of rhetoric, Petitioners' objections to mootness amount to these: (1) the existence of a "permanent" injunction creates a burden on the exercise of Petitioners' yet-to-be-established First Amendment rights, which burden will be lifted if Petitioners prevail on the

merits in this Court; (2) Petitioners have been subjected to fines that victory in this Court will annul; and (3) Petitioners might be criminally prosecuted for their past acts of discrimination unless this Court finds their past conduct protected. Petitioners' Response to Respondents' Suggestion of Mootness ["Response"] at 1-2. None of these "reasons" withstand scrutiny.

(1) The Existence of a "Permanent" Injunction.

Petitioners now assert that the state court injunction is an ongoing burden on their conduct of future parades. This argument is a flat contradiction of Petitioners' earlier recognition of the transitory nature of the injunction, whose ongoing viability was specifically linked by the Massachusetts courts to the possibility of changes in the nature of the parade:

> Although the Plaintiffs [Respondent in this Court] have obtained a permanent injunction, the injunction is conditional. The Plaintiffs are judicially empowered to march in the Veterans' Parade, and the Veterans are required to accept the Plaintiffs in their Parades on the same terms and conditions as other participants, *as long as the Veterans' Parades are not First Amendment activities*. The judgment is the equivalent of an unresolved chord, in that within the court's decision, it was stated that the Veterans' Parade could become a "protected First Amendment activity" (F. p. 31 n.27)

Defendants' [Petitioners'] Opposition to Plaintiffs' [Respondent's] Motion to an Award of Attorneys' Fees and Costs Against the South Boston Allied War Veterans Council and John J. Hurley ["Opposition to Attorneys'

Fees"], *GLIB v. John J. Hurley, et al.*, C.A. No. 92-1518, 92-1518A. (September 27, 1994.) (Emphasis in original.)

Recognizing the Massachusetts court's sensitivity to First Amendment concerns, Petitioners, by promulgating written standards, have endeavored to take advantage of that sensitivity in order to obviate the force of that court's injunction. They were entitled to do this, although they were certainly not obligated to do so. But having made this choice, Petitioners cannot also be heard to say that they have not changed the facts in a legally significant way, thereby rendering the controversy that brought them to this Court moot.

Taking the state court's express statement that its determinations were fact-specific to the Parade as it found it to have been constituted in 1993 together with the changes in Parade rules made by Petitioners to insure First Amendment protection for future Parades, it is clear that the state court injunction no longer speaks to future parades. Indeed, Petitioners have insisted that this is so in the above quoted language and in their pleadings in federal court. The factual predicates of the state court's action having been changed, nothing this Court might say about things as they were in 1993 will affect the conduct of any future Parade.

Petitioners argue that the controversy is not moot because their actions in thus altering their conduct were an "emergency response" to the unwanted "judicial mandates." Response at 5-6. In the first place, Petitioners were under no compulsion to change the nature of their parade, and even if they felt strong incentive to do so, this does not necessarily avoid mootness. *See Application*

of Kingsley, 802 F.2d 571, 577 (1st Cir. 1986) (appellant seeks order in forfeiture action to allow occupancy in residence pending outcome of action; his agreement with government allowing him to occupy residence subject to conditions mooted his claim, despite element of duress forcing appellant into agreement).

The present case does not bear comparison to *Allee v. Medrano*, 416 U.S. 802 (1974), cited by Petitioners, where Texas law enforcement agencies used force and intimidation against union members and officials to discourage organizing activities, and then in this Court urged mootness when the union members abandoned their organizing efforts in the face of this vicious and illegal harassment. *Id.* at 806-809. Nothing in this case remotely resembles the actions of the law enforcement agents in *Medrano*.

Moreover, Petitioners have decidedly not abandoned their activities, and indeed will march in 1995 without the participation of Respondents. Had this Court not granted certiorari in this case, and had the federal court not intervened in the 1995 Parade on the basis of the "protest theme," Petitioners would undoubtedly certainly have been before the state court arguing that new facts rendered the injunction moot, so that they could conduct future parades without Respondent.

Petitioners' argument misses the point in another way as well. The 1994 Parade has come and gone, and the same will be true of the 1995 Parade before this Court decides the merits of this case. Thus nothing that this Court does will affect the 1994 or 1995 Parades, nor can

this Court's decision affect any putative First Amendment chill that Petitioners allegedly have experienced up to the present time. Rather, as Respondent has previously explained,[1] the issue is whether the effect on future Parades of the injunctive remedy ordered by the Massachusetts courts is sufficient to present a live case or controversy in which Petitioners have a personal stake. *United States Parole Commission v. Geraghty*, 445 U.S. 388, 395 (1980). As Petitioners themselves have acknowledged, the injunction will have prospective effect only "as long as the Veterans' Parades are not First Amendment activities." Seeking to ensure that future Parades unquestionably *are* First Amendment activities, Petitioners have adopted rules that establish in writing Petitioner's asserted right to insist that "only banners, themes, messages, or displays approved by the Committee are allowed in the parade." *See* Respondent's Suggestion of Mootness at 7 n.2 (citing Petitioners' new Standards and Regulations at Paragraph 4). Wholly apart from the "protest theme," which Petitioners may or may not choose to retain in the future, the "new rules" clearly seek to take the state court trial judge at his word and establish beyond dispute that future Parades will be beyond the reach of the state anti-discrimination statute and the state court injunction. Under these circumstances, it is untenable, as well as irrelevant, to claim that the present controversy is exempt from mootness because the injunction constitutes a "state-forced change in [Petitioners'] speech," Response at 6, based on the fact that Petitioners have taken steps meant to unequivocally

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[1] Respondent's Suggestion of Mootness at 9.

assert their First Amendment rights as to future Parades. The rules Petitioners promulgated did not constitute conformity with the state court injunction or cessation of action in response to that injunction, but an effort to moot it and continue in their chosen course. It is equally insupportable for Petitioners to claim that their purported assertion of First Amendment rights is "temporary," as if they are planning to relinquish the protection of the First Amendment at some future time. *See* Response at 4 n.2.

Nor is it the case, as Petitioners assert, citing *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175 (1968), that the state court injunction continues to play a role in official response to Petitioners' activities. In *Carroll*, members of a white supremacist group alleged that the continuing effect of a ten day restraining order, affirmed by the Maryland Court of Appeals, had a lasting effect on their ability to hold rallies in Princess Anne, Maryland. The order by its terms only prevented one rally, but the petitioners alleged that the affirmance of the order by the Maryland Court of Appeals resulted in the denial of at least one other permit outside the ten day period. *Id.* at 177-78. This Court agreed that the case was not moot because the Court of Appeals' decision played a substantial role in the response of officials to requests by the petitioners for other permits. *Id.* at 178.

In the present case, in contrast, there was no denial of a permit. Petitioners had a permit for 1994 which they chose not to use. As for 1995, the federal district court action has resulted in a declaration the Petitioners are entitled to a permit to conduct the Parade not subject to the state court injunction, and based on the City of Boston's representations to the federal district court, a permit

will issue and Petitioners will hold the 1995 Parade without Respondents' participation. *See South Boston Allied War Veterans Council v. City of Boston*, No. 94-11402MLW (D.Mass 1995), slip op. at 69. The issuance of permits in future years, unlike the case presented in *Carroll*, depends on a new determination by the state court, on the basis of Petitioners' "new rules," adopted by Petitioners in an effort to ensure First Amendment protection, and on the basis of their unambiguous and uncoerced intent to transform future Parades from what the state courts have found to have been "open recreational events" into First Amendment activity.[2]

Princeton University v. Schmid, 455 U.S. 100, 103 (1982) (per curiam), cited by Respondent in its Suggestion of Mootness, and ignored by Petitioners in their Response, is emphatically on point. In that case, Princeton University had regulations in effect at the beginning of the lawsuit that required non-students who wished to distribute materials on campus to receive permission from University officials. *Id.* at 101. Schmid violated that rule and was convicted of criminal trespass. The New Jersey Supreme Court invited the University to intervene and participate as a party. The University did so. When the New Jersey Supreme Court reversed Schmid's conviction,

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[2] It is disingenuous, to say the least, for Petitioners to claim that mootness would penalize them for obeying a court order. Response at 6. Petitioners did not disobey the order to include Respondent in the 1994 Parade but neither did they obey it. As for 1995, they have obtained the relief they sought in federal court and will have a Parade "honoring St. Patrick" without the presence of Respondent.

Princeton appealed to this Court, alleging that the judgment below violated its First, Fifth and Fourteenth Amendment rights. *Id.* This Court dismissed the appeal, stating:

> The New Jersey Supreme Court noted that while the case was pending on appeal, the University substantially amended its regulations [relating to distribution of materials on campus by those not affiliated with the University]. The opinion below rested on the absence of a reasonable regulatory scheme governing expressional activity on University property, but the regulation at issue is no longer in force. **Furthermore, the lower court's opinion was careful not to pass on the validity of the revised regulation under either the Federal or the State Constitution**. Thus the issue of the validity of the old regulation is moot, for this case has "lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract questions of law."

Id. at 103 (citation omitted; emphasis added). In the present case, the Massachusetts courts were equally careful to tailor their holding to the prior factual regime under which Petitioners conducted the Parade. Having now announced that there are "new rules" designed to protect the "traditional themes" of the Parades, Petitioners have mooted the issue originally presented to this Court, whether the Massachusetts courts rightly decided that the First Amendment did not shield Petitioners from the reach of the public accommodation statute in conducting the parade as then constituted.

(2) Liability for Fines and Attorneys' Fees.

Petitioners assert that they "have been subjected to substantial fines because of activity protected by the first and fourteenth amendments." Response at 2. They neglect to mention that the penalty alluded to was imposed in an entirely separate case that is not before this Court, *Patrick Ward v. South Boston Allied War Veterans Council*, MCAD No. 92-BPA-0014. A petition to review that case, *see* Mass. Gen. Laws, c. 151B, § 6, filed in Massachusetts Superior Court, No. CV-94-00456, was dismissed for lack of service on May 25, 1994.

Under these circumstances, there is no merit to the argument that the *Patrick Ward* case, now dismissed, gives Petitioner's a live stake in the present case. If this Court were to reverse the Supreme Judicial Court's decision in this case, it would not relieve plaintiffs of any penalties imposed in that case.[3]

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[3] Moreover, the penalty at issue was levied for Petitioners' behavior in the 1992 Parade, an event which raised legal issues quite different from those in the present case. The City of Boston was a major actor in the 1992 Parade. Indeed, Respondent won the right to march in the 1992 Parade on the theory that the City of Boston, and Petitioners, "acting under color of state law, have deprived [Petitioners] of the rights to freedom of speech, association, assembly, and equal protection of the laws in violation of the first and fourteenth amendments to the U.S. Constitution, 42 U.S.C. § 1983, and Articles 1 and 16 of the Massachusetts Declaration of Rights." Verified Complaint, *Irish-American Gay, Lesbian and Bisexual Group of Boston, etc. v. City of Boston, et al.*, Civil Action No. 92-1518 ["No. 92-1518"], paragraph 35. Respondent also relied on the Massachusetts Civil Rights Act and a claim for breach of contract, both claims reaching both the City and Petitioners. Verified Complaint, paragraphs 36-40. The

As for the issue of attorneys' fees, the trial court's award of fees to Respondent in the present case is currently on appeal by Petitioners. The issue of the 1992 attorneys' fees remains undecided, but, as with the penalties, that Parade raises issues of state action not present in the current case. In any event, a claim for attorneys' fees cannot enliven an otherwise moot controversy. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (federal law) (1990); *Ott v. Boston Edison Co.*, 413 Mass. 680, 683, 602 N.E.2d 566, 588 (1992) (Massachusetts law). In addition, Respondent no longer has any wish to seek to collect attorneys' fees, either for the 1992 case or for the present case, and counsel represents to the Court that appropriate steps to permanently relinquish those claims will be taken forthwith.

(3) Danger of Criminal Prosecution.

The last discriminatory act on the part of Petitioners occurred in early 1993, when Respondent was denied a registration form for the 1993 Parade. No criminal prosecution has been undertaken against Petitioners, and two years later there is no evidence that any is contemplated. Under these circumstances, the threat of criminal

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Superior Court (Zobel, J.) found that Respondent was entitled to a restraining order requiring that they be permitted to march in the 1992 Parade because, in relevant part, he found that Respondent was likely to succeed on its claim that it would otherwise be deprived of its constitutional right of peaceable assembly. No. 92-1518, Proceedings, March 11, 1992, at 10. No appeal was taken from that order.

prosecution is chimerical, and will not confer jurisdiction of an otherwise moot controversy upon this Court. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 n. 29 (1974); *McCollester v. City of Keene, N.H.*, 668 F.2d 617, 619-20 (1st Cir. 1982) (to present a live controversy based on threat of criminal sanctions, there must be a "realistic danger of prosecution.")

CONCLUSION

The "unfortunately enduring dispute" between Petitioners and Respondent may continue. Indeed, Petitioners have taken the position that it is "type of conflict that cannot be resolved in a court of law." Opposition to Attorneys' Fees at Paragraph 11. At this juncture, it is clear that Article III bars this Court's advice on a phase of the dispute that Petitioners have made irrelevant by their subsequent conduct.

Respectfully submitted,

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